No. 80-812

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE MESCALERO APACHE TRIBE, PETITIONER

v.

FRED L. O'CHESKEY, COMMISSIONER OF REVENUE, STATE OF NEW MEXICO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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This case presents the question whether the State of New Mexico may tax the gross receipts of non-Indian contractors performing construction services for the Mescalero Apache Tribe within the boundaries of the Tribe's reservation. For the reasons set forth below, the United States, which is concerned both because of its special relationship with American Indians and because of its interest in effectuating congressional policies of encouraging tribal economic self-sufficiency, urges that the petition for certiorari be granted.

1.a. The Mescalero Apache Tribe is a federally recognized Indian tribe that occupies a reservation in southern New Mexico (Pet. App. 3c-4c). In the 1960's, the Tribe commenced planning of a resort complex, consisting of a

hotel and associated recreational facilities, to be constructed on the Tribe's reservation.[1] The resort, known as the Inn of the Mountain Gods, was intended as a means of generating income to assist in the Tribe's economic development and, in particular, to replace anticipated declining revenues from tribal timber enterprises (*id.* at 6c).

Primary funding for the complex was obtained from the Economic Development Administration (EDA), an agency of the United States Department of Commerce (Pet. App. 6c). Additional funding has been obtained through a bank loan, 90% of which is guaranteed by the Secretary of the Interior under the Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.* The other 10% is guaranteed by the Tribe through the assignment to the bank of certificates of deposit (Pet. App. 12b).

When the Tribe first sought bids on the project, only one contractor submitted a bid and that bid exceeded available funding. To reduce costs, the Tribe divided the project into sub-projects and deleted some previously planned features. Some bidders had apparently included the cost of the New Mexico gross receipts tax, which was then calculated as 4% of a contractor's gross receipts (Pet. 4).[2] (The budget submitted to EDA had not included such a tax.) The Tribe asked the bidders to submit alternate bids that did not include the tax. The total of the accepted bids calculated without the tax amounted to a sum within available funding

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[1]The question of the State's attempt to regulate liquor sales at the resort complex was litigated in *United States* v. *New Mexico*, 590 F. 2d 323 (10th Cir. 1978), cert. denied, 444 U.S. 832 (1979), holding that the State lacked such authority. The Tribe has also developed the Sierra Blanca ski resort located outside the reservation boundaries. That enterprise was considered by this Court in *Mescalero Apache Tribe* v. *Jones*,

[2]This tax, now codified at N.M. Stat. Ann. § 7-9-1 *et seq.* (Supp. 1980), has since been reduced to 3 3/4% of gross receipts.

(Pet. App. 7c). The selection of contractors and the terms of each contract depended on EDA approval (*ibid.*). Bureau of Indian Affairs officers participated in all the negotiations involving the project and also approved the ultimate contracts (Pet. App. 6b). Contractors selected included both New Mexico companies and out-of-state firms; all were non-Indian firms (*id.* at 1b, 2c).

Before construction work began, a representative of the New Mexico Construction Industries Commission, the agency responsible for inspecting construction work in the State, requested that the contractors obtain New Mexico building permits and that he be allowed to inspect their work. These requests were refused by the Tribe's president, and the Construction Industries Commission made no further attempt to assert jurisdiction over the project (*id.* at 9c). Inspection and supervision of the construction activities was performed only by the Tribe's agents and by federal authorities (*ibid.*). The BIA, represented on the reservation by its Mescalero Agency, issued Indian trader licenses to the contractors, under the Indian trader statutes, 25 U.S.C. 261 *et seq.* (Pet. App. 5c, 8c).

b. Late in 1974 and in February 1975, the New Mexico Bureau of Revenue filed gross receipts assessments against all the resort complex contractors (Pet. App. 1c). The contractors filed protests against each of the assessments. In 1976, after the Tribe's attempts to intervene in the administrative assessment proceedings had been finally rejected by state courts (*id.* at 14b n.29), the Tribe filed this action in the United States Court for the District of New Mexico seeking a declaration that the State's attempt to levy its gross receipts tax on the contractors with respect to their work for the Tribe performed entirely on the Tribe's reservation was, *inter alia*, an impermissible interference with tribal self-government and was also barred by virtue of federal

preemption (*id.* at 1b, 3b-4b).[3] The district court ruled against the Tribe with respect to these arguments (Pet. App. 14b-17b).[4]

c. On appeal, the court of appeals, sitting en banc, affirmed the district court (Pet. App. 1a-17a), Judges Doyle and McKay dissenting (Pet. App. 17a-48a). The court held that the actual impact of the tax on the Tribe was irrelevant and that "the initial incidence of the tax," which was on the non-Indian contractors, was "the only significant matter for our consideration" (*id.* at 6a-7a). It also stated that the situs of the services on the reservation was "not a factor to be considered" (*id.* at 8a). The court cited this Court's opinion in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), as authority for the proposition that, where the application of state laws on the Mescalero Reservation is concerned, there is "no room for any doctrine of preemption" (Pet. App. 8a), although it thereafter expressly considered and

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[3]Among the grounds for preemption, the Tribe relied on the Indian trader licenses issued by the BIA to the contractors. The district court invalidated the licenses on the grounds that the transactions in this case were engaged in by "experienced, knowledgeable people on a highly sophisticated level" and that the Indian trader statutes were not designed to cover such situations (Pet. App. 6b). This ruling was not appealed to the Tenth Circuit. We note, nevertheless, that the district court's rationale is not supported in the case law. See *Central Machinery Co.* v. *Arizona Tax Comm'n*, No. 78-1604 (June 27, 1980) slip op. 5. The Department of the Interior, however, is in the process of revising its Indian trader regulations in such a way as to preclude issuance of Indian trader licenses to contractors similarly situated to those in this case. Therefore, the issue of federal preemption based on the Indian trader statutes will not be pressed here.

[4]As to a contractor on a related tribal housing project involved in the case, the district court held (Pet. App. 11b) that New Mexico law precluded assessment of that part of the gross receipts tax attributable to purchases of materials, because, under the terms of the contract, the contractor had acted as the Tribe's agent in purchasing the materials. The contractor was held liable for the tax on its receipts attributable to construction services (*ibid.*).

rejected preemption claims based on a treaty and on the Indian trader licenses (*id.* at 9a-10a).

d. On June 27, 1980, several weeks after the court of appeals issued its en banc opinion, this Court decided *White Mountain Apache Tribe* v. *Bracker*, No. 78-1177, and *Central Machinery Co.* v. *Arizona State Tax Comm'n*, No. 78-1604, two cases involving state power to tax non-Indians doing business on Indian reservations. The Tribe thereupon petitioned the court of appeals for rehearing, urging that its decision was inconsistent with *White Mountain Apache Tribe* and *Central Machinery*. The court of appeals, in a short opinion (Pet. App 48a-51a), denied rehearing. It found *Central Machinery* inapposite (*id.* at 48a-49a), and it sought to distinguish *White Mountain Apache Tribe* on several factual grounds (*id.* at 49a-50a). It concluded that "it appears that the elements in both cited cases were considered and evaluated [in the original opinion]" (*id.* at 51a).

2. In our view, the court of appeals' decision in this case is inconsistent with *White Mountain Apache Tribe* v. *Bracker*, *supra*. In *White Mountain Apache Tribe*, this Court stated (slip op. 8) that a determination whether a state may impose a tax on non-Indians providing services to Indian tribes on reservations requires "a particularized inquiry into the nature of the State, Federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." The court of appeals was correct in noting that the facts of this case in some respects different from the circumstances in *White Mountain Apache Tribe*—the taxes are not identical (although the motor carrier license tax there, like the tax there, was a gross receipts tax), and the federal involvement in the reservation construction activities takes a different form from the federal involvement in the tribal timber enterprise in *White Mountain*

Apache Tribe. Nonetheless, the same analysis is appropriate, and the court of appeals—by finding the legal incidence of the tax a determinative factor, ignoring the significance of the reservation locus of the construction activities, and rejecting with little discussion the applicability of the preemption doctrine in this case—failed to make the appropriate inquiry. It has, for example, failed properly to consider the degree to which the federal government, through its policies for tribal economic development and the supervision by both the EDA and the BIA of on-reservation activities, has developed a scheme which leaves no room for this exercise of the State's taxing power.

The question of the States' power to impose such taxes is likely to be a recurring one in the Tenth Circuit, in which many tribal reservations are located. Since 1974, the EDA has administered, pursuant to congressional mandate, a special program for tribal economic development projects (42 U.S.C. 3172; 13 C.F.R. 317.61) with special eligibility and funding requirements (42 U.S.C. 3131(c), 3161(a); 13 C.F.R. 306.16). The en banc decision in this case, if not vacated, will foreclose appropriate review of taxes imposed by states in that judicial circuit on non-Indian participants in such projects.

Accordingly, the petition for a writ of certiorari should be granted. In our view, the undisputed facts are sufficient to justify final disposition of the case by this Court. On the

other hand, because the factual record was completed well before this Court's opinion in *White Mountain Apache Tribe,* it may be appropriate to direct that the case be remanded to the district court for further development of the context in which the resort project was planned and carried out.

WADE H. MCCREE, JR.
Solicitor General

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